IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.912 OF 2002

Anilkumar @ Pappu Barafwalla,
Chotelal Singh,
Age 21 years, Occ: Service,
R/at Kashigaon, Noor Manzil,
C/302, Post Mira, Taluka
& District Thane, presently
at Central Jail at Thane,
Maharashtra. ....Appellant.

V/s

The State of Maharashtra. ...Respondent.

Mr. H.H. Ponda with Mr. Naveen Chomal for the appellant.

Mr. D.P. Adsule, APP for the State.

CORAM: V.M.KANADE,J.

DATE: 4th October, 2004.

ORAL JUDGMENT:

1. Appellant is challenging the judgment and order dated 6/8/2002 passed by the 3rd Additional Sessions Judge, Thane in Sessions Case No. 341 of 1997. The accused was convicted by the Trial Court for the offence punishable under section 376 of the Indian Penal Code and sentenced to suffer R.I. for three months and to pay fine of Rs 5000/- and, in default, to suffer R.I. for three months. The accused was also convicted for an offence under section 506(II) of the Indian Penal Code and sentenced to suffer R.I. for one year and to pay fine of Rs 5000/- and, in

default, to suffer R.I. for one month.

2. Prosecution's case is that the appellant - accused used to tease the prosecutrix Nasim Begum and on 3/11/1996, when she was going to the house of her uncle - Shamun Mohammad, the accused forced her to occupy the rickshaw and forcibly took her towards Dahisar. According to her, the person who was trying to kidnap her, pointed knife to the rickshaw driver. She identified the voice of the accused and saw his face in the electric light. Prosecution's case is that the accused tied the hands of Nasim Begum with her Dupatta and, therefore, she could not resist. Her mouth was also gagged with the hands of the accused and, therefore, she could not resist and shout and that the accused had also threatened her with a knife. At Dahisar Checknaka, the accused got down and asked the prosecutrix to accompany him and picked up another rickshaw and proceeded towards the direction of Bombay City. According to the prosecution, the accused closed the eyes of the prosecutrix with the help of strip and, therefore, she could not know where they were travelling and after about 15 to 20 minutes, the accused stopped the rickshaw. She was taken to a room where he told the persons who had assembled there that he had married the prosecutrix. The accused,

thereafter, brought meals. Both of them had the meals and thereafter accused raped her at night and she resided in the same place for about two months and she was forced to write some letters which were love letters. Some photographs were also taken with the help of a photographer. Then on 06/01/1997 when the accused had gone out of the house, she went to nearby booth and informed her parents about her whereabouts. Her father came there and took her home and a complaint was lodged and the accused was arrested. The Trial Court on the basis of the evidence adduced by the prosecution convicted the accused and sentenced him to suffer R.I. for 10 years.

3. Prosecution has examined P.W. 1 - Sapna Tejas Sarkar who was residing in Indira Nagar area where allegedly the accused had kept the prosecutrix. This witness has turned hostile and has not supported the prosecution case. P.W. 2 is Ratnamma S. Nair who is working as Principal in-charge of B.M.S. English School, Kashimira. She has produced a School Leaving Certificate in which the birth date of the prosecutrix is shown as 08/12/1984. P.W. 3 is the prosecutrix - Nasim Begam Munshi Kazi. She has stated that she used to visit her maternal aunt who was residing at Noor Apartment in the village and one Amita Singh was also

residing in the said Apartment on the same floor and she got acquainted with Amita Singh. The accused was brother of Amita Singh. After the marriage of Amita Singh, she stopped visiting her house. She knew the accused and some times they used to talk with each other. She has stated that the accused use to tease her and, therefore, she stopped visiting her maternal aunt and made a complaint to her father about the behaviour of the accused. Her father informed the parents of the accused and asked them to persuade the accused to improve his conduct. Thereafter, the accused stopped teasing her. On 3/11/1996, she was kidnapped by the accused and he threatened to kill her if she raised shouts. He took her to a slum area and she was taken to a room. She was kept there for about two months. She was raped repeatedly every day. P.W. 4 - Munshi Mohd. Ali Kazi is father of the Prosecutrix. He has stated that he filed a Complaint in the Police Station that his daughter had been taken away with the help of three other persons who are named in the Complaint viz., (1) Tata Patel; (2) Jeebu Patel; (3) Kamik Patel. There is a material contradiction in the evidence of the Prosecutrix and her father - PW-4. Her father - PW-4 has stated that he has lodged N.C. Complaint after Accused has started teasing his daughter. However, N.C.

Complaint has not been brought on record. In his evidence, he states that he has lodged the complaint against the accused as he suspected that the accused must have done something. In the F.I.R., however, he has given the names of three other persons. However, he has not mentioned their names in his Examination-in-Chief. The Investigating Officer also has not stated anything as to what steps were taken to trace these three persons. They have not been arrested and they have not been arraigned as accused in the case of kidnapping and rape. Even PW-3 - Prosecutrix has not mentioned their names. The story of the prosecution about kidnapping and her wrongful detention in that room for about two months also cannot be believed. The Prosecutrix had ample opportunity to raise shouts or to escape from the room where she was kept. The room was situated in a slum near the railway track. She had not made complaint to any of the slum dwellers. The prosecution has also not examined any independent witnesses. PW-1 and 2 have turned hostile. The prosecution has not examined the rickshaw driver or no attempts were made to trace the said person. It is difficult to believe that the accused could forcibly abduct the prosecutrix from a crowded locality without being noticed. The prosecutrix had an ample opportunity to run away or to

inform her parents. PW-4 - father of the prosecutrix also, apart from lodging the complaint, thereafter, has not taken any steps to find out the whereabouts of his daughter. The medical evidence also does not support the prosecution case as no external injuries were found on the person of the prosecutrix. The prosecution has not examined the doctor; but medical certificate has been brought on record. The prosecution has levelled a serious charge of section 376(2)(f) of the I.P.C. against the accused. It was the duty of the prosecution to prove beyond reasonable doubt that the prosecutrix was below twelve years of age. Apart from examining the principal of the College, the prosecution has not taken trouble of bringing on record the birth certificate of the prosecutrix. Ossification test has not been done by the Doctor to show that her age was less than twelve years. The trial court has relied on the birth certificate which was produced by the Principal which is marked as an Article-A and application made by father which is marked as Article-B. These two documents have not been exhibited. It was the duty of the prosecution to have got these two documents exhibited which were produced on the question being asked in the cross- examination. The provisions of Section 163 of the Evidence Act are very clear and

according to the said section if any document is referred to or is asked to be produced by the party who is asking the witness any question in cross-examination then the document can be exhibited, if it is so referred by the party who is being cross examined. However, this has not been done. As a result, the birth certificate is not proved and exhibited. The Trial Court has however, relied on the birth certificate, while coming to the conclusion that she was less than twelve years of age. In my view, the said finding of the trial court also cannot be accepted. It is the duty of the prosecution to prove beyond the reasonable doubt that the prosecutrix is below twelve years of age. The story of the prosecutrix appears to be improbable and she appears to have gone on her own and stayed with the accused. It is a settled position in law that in the absence of any concrete proof regarding the age of the prosecutrix, benefit of doubt should be given to the accused. In my view, in this case, it is not conclusively proved that the prosecutrix was below twelve years of age. Though the house was searched almost after ten days after the accused was arrested, the love letters which were seized from the said house have not been produced on record. Similarly, the clothes of the accused and the prosecutrix which were

found in the hut also have not been seized and no panchanama has been made in respect of the said clothes. The investigation therefore has been carried out in an half-hazard manner. From the available evidence on record in my view, it appears that the prosecutrix had gone on her own free will and stayed with the accused. However, the fact remains that though it is not proved that she was below twelve years of age, from the evidence of her father and the principal, it will have to be held that she was not major but was minor below eighteen years of age and therefore, technically the accused has committed an offence of rape, though it cannot be said that he had committed an offence under section 376(2)(f) of the I.P.C.

4. In my view, the prosecution has not conclusively proved that the prosecutrix was below twelve years of age. It is difficult to rely on the School Leaving Certificate particularly when the evidence of the Principal is to the effect that the father of the girl had given the birth date of the girl at the time of taking admission. The documents which are referred to in the cross-examination of the Principal are not brought on record. There is nothing to indicate in view of this that the age which is reflected in the

School Leaving Certificate is based on the birth certificate. The prosecution also has not adduced any other medical evidence to prove that the prosecutrix was below 12 years of age. They have not examined the Doctor. The Investigating Officer also has not taken the trouble to prove the birth certificate on record. The charge under section 376(2)(f) is a serious charge which entails a minimum punishment of 10 years. It was the duty of the prosecution in view of the seriousness of the charge to have taken adequate measure to adduce evidence on record to conclusively prove that the prosecutrix was below 12 years. Considering the evidence on record particularly the evidence of the prosecutrix which creates a serious doubt regarding her entire deposition, it is difficult to accept the prosecution case on the basis of the School Leaving Certificate that the prosecutrix is below 12 years of age. In view of this, the case of the prosecution would not fall under clause (f) of sub-clause (2) of Section 376 of IPC. The accused is therefore, convicted u/s. 376 and 363 of the IPC and his sentence is reduced from 10 years to the one which he has already undergone. The accused is in jail since 10th April 2002 and has already undergone 2 years and 6 months. The appellant is therefore directed to be released on the sentence which he has

already undergone. He is however acquitted under the provisions of section 506 II of the IPC.

5. The appeal is allowed in the above terms.

V.M. KANADE, J.